BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered June 18th, 1942. (R. 59).

Petition for rehearing was denied July 22nd, 1942.

The jurisdiction of this Court is invoked under Title 28, Section 347 of the United States Code.

The facts have been fully set forth in the petition for Writ of Certiorari, pages 1-8, *supra.*

SPECIFICATION OF ERRORS ASSIGNED.

I.

The Circuit Court of Appeals for the Fifth Circuit erred in holding that the provisions of Section 421, Title 28, United States Code, were directory, and not mandatory.

II.

The said Court erred in holding that more than one Grand Jury could be lawfully convened and act while a previous grand jury was adjourned subject to call and still in existence in the Western District of Louisiana, and also in treating divisions of the District as separate District Courts.

III.

The said Court erred in holding that an indictment found by such subsequently called Grand Jury would be valid.

IV.

The Court erred in holding that any number of jury commissioners could be appointed in a judicial district and a jury box could be filled by any other than the first appointed Commissioner who was still acting.

ARGUMENT.

Section 421 of Title 28, United States Code, was originally Section 810 of the United States Revised Statutes, and became Judicial Code, Section 284. After receiving this number, several amendments have been made, only one of which will be now considered, since the reason for this amendment is here pertinent.

I.

In the Seventy-first Congress a bill numbered Senate Bill 4425 was introduced for the purpose of obtaining Congressional authorization for a third Grand Jury in the Southern District of New York.

An explanation of this bill is contained in a letter from the then Attorney General William D. Mitchell, which letter was embodied in the House Report No. 2282, made to the Seventy-first Congress, Third Session. This was submitted by the Committee on Judiciary on January 15th, 1931, with this statement:

> "This bill was introduced at the request of the Attorney General, the need and effect of the Legislation is set out in a letter dated April 25, 1930, from

the Attorney General to Honorable George W. Norris, Chairman of the Senate Judiciary Committee."

This letter as thus reported reads:

"Department of Justice
Washington, D. C. April 25, 1930

Hon. George W. Norris
Chairman Committee of the Judiciary
United States Senate

My dear Senator:

Inclosed herewith are copies of letters dated March 11th and April 14, 1930 from the United States Attorney Charles H. Tuttle of the Southern District of New York, in which he recommends the enactment of a law to permit more than two grand juries to be in session simultaneously in the Southern District of New York. Also a copy of a letter from former United States Attorney Buckner of the Southern District of New York, dated March 26, 1926, making the same recommendation.

These communications convince me that the suggested amendment should be enacted.

Existing law (Section 284 of the Judicial Code), Section 421, Title 28, United States Code, authorizes a second grand jury in districts having a city or borough of at least three hundred thousand inhabitants, but has been held in the Southern District of New York not to authorize the impaneling of a third grand jury. During the Sixty-ninth Congress this department recommended an amendment of Section 284 which would have authorized the summoning of additional grand juries without limit in populous districts, where the exigencies of the public service required such action. The Department did not, however, press that recommendation. I now suggest and recommend the enactment of an

Amendment to Section 284 to authorize a third grand jury in the Southern District of New York only.

* * * * * * * * *

Respectfully,

William D. Mitchell
Attorney General."

Attached to this letter were letters:

1. To the Attorney General from Emory R. Buckner, United States Attorney, dated New York, March 26, 1926.
2. To the Attorney General from Charles H. Tuttle, dated New York City, March 11, 1930.
3. To the Attorney General (Attention Hon. Charles P. Sisson) from Charles H. Tuttle dated New York City, April 14, 1930.

Found in Volume of House Reports on Public Bills, etc.

Seventy-first Congress
Third Session"

It will be noted that its significance here is emphasized by the sentence in the letter which reads,

"During the Sixty-ninth Congress this Department recommended an amendment of Section 284 which would have authorized the summoning of additional grand juries without limit in populous districts, where the exigencies of the public service required such action. The Department did not, however, press that recommendation."

It is also highly significant that the Attorney General stresses his recommendation of the amendment to authorize a third grand jury by the use of the final word

in the phrase "in the southern district of New York *only*." (Italics ours).

Further argument would appear superfluous but we beg to submit to this Court certain authorities whose reasoning it would be hard to reconcile with the holdings of the Circuit Court of Appeals.

On page 7 of the Court's opinion (R. 65) the Court said:

> "We think the statute as to the number of grand juries permissible in the different situations named in it, was only directory, and not intended to impose mandatory restrictions on the judge."

It is clear that the Attorney General and the Congress of the United States did not consider Section 284, Judicial Code (now Title 28, Section 421, United States Code) as anything but mandatory for if it were directory, then the amendment adopted by the 71st Congress on February 25th, 1931, was unnecessary and a futile waste of time on the part of the Congress and the Judiciary Department.

In *Escoe v. Zerbst, 295 United States 490, 494*, the Court said:

> "Statutes are not directory when to put them in that category would result in serious impairment of the public or private interests that they were intended to protect."

Also, in an early case, *French v. Edwards, 13 Wall. 506, 511:*

> "When the requisitions prescribed are intended for the protection of the citizen * * * and by a dis-

regard of which his rights might be and generally would be injuriously affected they are not directory, but mandatory."

II.

On pages 4 and 5 of the Circuit Court's opinion (R. 62-63) it is said:

"Its other point that in a district composed of divisions as this district is, there may be only one grand jury summoned for the entire district * * * is no better taken."

In *United States v. Cooper Corporation, 312 U. S. 600, 605*, the Court said:

"It is not our function to engraft upon a statute conditions which we think the Legislature logically might or should have made." *Ebert v. Poston, 268 U. S. 548, 554*, is cited and is pertinent here.

We again refer to the House Report previously quoted and the letter from the Attorney General.

We call attention to the language of the Section 421 in which a second grand jury is authorized in districts having a city or borough with 300,000 inhabitants.

As at first written in Section 284, this sentence read:

"If the United States Attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing the district judge, or the senior judge of the District that the exigencies of the public service require it, the judge may, in his discretion, also order a venire to issue for a second grand jury."

This language was continued in United States Code. When this section was amended by Act April 17, 1940, there was a slight change made and the words "or the senior judge" were stricken out and "the" before district judge changed to "a"; but no change was made authorizing a second grand jury in either division or district which did not contain a city or borough of 300,000 inhabitants.

This demonstrates that neither Congress nor the Attorney General have seen fit to reoffer the recommendation which the Attorney General states was made to the 69th Congress to grant districts which were "populous" the right to have "grand juries without limit."

Title 28, Section 421, United States Code, specifically limits the authority to summon second grand juries to districts having a city or borough containing 300,000 inhabitants.

In the recent case of *Botany Worsted Mills v. United States, 278 U. S. 282,* on *page 289,* this Court said:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

This identical language is used in the *Raleigh and Gaston Railroad Company v. John A. Reid* case, *13 Wallace, 270,* which is cited.

In *D. Ginsberg & Sons v. Popkin, 285 U. S. 204, 208:*

> "General language of a statutory provision although broad enough to include it will not be held to apply to a matter specifically dealt with in another part of the same enactment * * *. Specific terms pre-

vail over the general in the same or another statute which otherwise might be controlling," citing authorities.

And in *Atkins v. Fiber Disintegrating Company, 18 Wall. 272,* on *page 302:*

"The general language found in one place, may be restricted in its effect to the particular expressions employed in another, if such upon a careful examination of the subject, appear to have been the intent of the enactment."

In *Pennington v. Coxe, 2 Cranch 33,* on *page 59,* the Court said:

"Where the legislature distinguishes between different objects * * * it is not for the court to beat down these distinctions."

III.

No indictment could be valid unless found by a grand jury convened according to law, otherwise the constitutional guarantee would be of no effect.

In *Gillis v. State of California, 293 U. S. 62, 66,* the Court said:

"The accepted doctrine is that the lower Federal Courts were created by the Act of Congress and their powers and duties depend upon the acts which called them into existence or subsequent ones which extend or limit."

In *Ex Parte Mills, 135 U. S. 263, 267:*

"A grand jury by which presentments or indictments may be made for offenses against the United States is a creature of statute. It cannot be impaneled by a court of the United States by virtue simply of its organization as a judicial tribunal."

Page 270. "This is not a case of mere error, but one in which the court below transcended its powers."

In *Ex Parte Wilson, 114 U. S. 417*, the Court held, *page 429:*

"Our judgment is that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime, within the meaning of the Fifth Amendment of the Constitution, and that the District Court in holding the petitioner to answer for such a crime and sentencing him to such imprisonment, without indictment or presentment by a grand jury exceeded its jurisdiction and he is therefore entitled to be discharged."

IV.

The evidence shows that Adolph Jacobs was appointed Jury Commissioner in 1924 and was still performing the duties of the office and that Dalton was appointed in 1932 (R. 13), and that Dalton placed the names in the jury box out of which were drawn the names of those who acted as Grand Jurors April 29th, 1941, and presented the indictment (R. 14).

It is true that one district court has held that more than one jury commissioner may be appointed, but the language of the Statute does not justify this construction, inasmuch as it reads:

"A commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner, etc. Title 28, Section 412, United States Code."

The word "A" is deliberately used and the words "which commissioner" refer to a single commissioner.

Any other construction would do violence to the English language. The last sentence in the above quoted section requires "said commissioner" to alternate with the Clerk or his deputy in placing names in the jury box.

In *United States v. Gale, 109 U. S. 65,* the Supreme Court on *page 71,* said:

> "There are cases undoubtedly * * * which objection to the grand jury can be taken at any time. These are where the * * * jury * * * has been selected by persons having no authority whatever to select them."

In *United States v. Lewis, 192 Fed. 633, 638:*

> "The selection of a grand jury by the officers who by law are the only ones invested with that power, is not a mere defect or imperfection of form. It is a matter of substance which cannot be disregarded without prejudice to an accused."

V.

The Circuit Court cites *Claussen v. United States, 114 U. S. 487,* but the reference is inappropriate, because courts were not then acting under such a statute as Title 28, Section 421 of the United States Code; furthermore, the point was not the same and it was not the same in *Breese v. United States, 203 Fed. 824* (see judgment, pages 4-5, R. 62, 63).

In *Borgia v. United States, 78 F. (2d) 550* (Judgment, page 3, footnote, R. 61), the question was as to the continuance of a grand jury, and the court also in its opinion laid special stress on the fact that the district was one in which there was a city containing 300,000 inhabitants.

United States v. Perlstein, 39 F. (2d) 965, referred to (judgment, p. 7), (R. 65) was before the Circuit Court of Appeals in *120 F. (2d) 276*, where the court said the question was whether an investigation had been begun before a jury term expired (p. 279), and there said:

> "The date when the grand jury began its investigation as to these defendants does not appear in the record,"

and on *page 280:*

> "There were presented to the court in support of the motions neither record facts, admissions by the Government nor affidavits by persons acquainted with the facts. Because of this fact of verification the motions to quash were properly denied."

CONCLUSION.

It is respectfully submitted that the petition for certiorari should be granted and the Honorable Supreme Court of the United States, after hearing, should reverse the judgment of the Circuit Court of Appeals for the Fifth Circuit, and order defendant discharged.

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